No. 88-2123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY,
and
NATIONAL TREASURY EMPLOYEES UNION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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QUESTION PRESENTED

Whether a dispute concerning a federal agency's compliance with non-discretionary requirements of OMB Circular A-76, a government-wide directive concerning contracting-out of services, may be resolved through the grievance and arbitration process set forth in Title VII of the Civil Service Reform Act of 1978.

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INTRODUCTION

The National Treasury Employees Union (NTEU or the union) files this memorandum in response to the petition for writ of certiorari filed by the Internal Revenue Service of the Department of Treasury (IRS or the agency). This case concerns the negotiability of an NTEU bargaining proposal that would permit challenges to agency violations of OMB Circular A-76, a government-wide directive concerning contracting-out, to be resolved through the negotiated grievance and arbitration procedure. It is our position that the decision of the D.C. Circuit ruling

NTEU's proposal negotiable is correct, and should be affirmed. However, because this case concerns issues that are of substantial importance to both employees and management under the labor management relations scheme set forth in Title VII of the Civil Service Reform Act of 1978, on which the circuit courts are now in conflict, NTEU does not oppose the agency's petition.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the petition, at 2-4, the case requires the consideration of the following.

5 U.S.C. § 7103 provides in relevant part:

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by federal statute[.]

5 U.S.C. § 7121 provides in relevant part:

> (c) The preceding subsections of this section shall not apply with respect to any grievance concerning—
>
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
>
> (2) retirement, life insurance, or health insurance;

> (3) a suspension or removal under section 7532 of this title;
>
> (4) any examination, certification, or appointment; or
>
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

STATEMENT

A. The Federal Labor Management Relations Scheme

1. *Introduction.* This case involves the collective bargaining and dispute resolution provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* (CSRA or "the Statute"). Title VII of the CSRA is the first codification of labor relations in the federal service. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983). The major purposes of Title VII were to strengthen the position of federal unions, to make collective bargaining a more efficient instrument of the public interest, and to preserve the ability of federal managers to maintain "an effective and efficient government." *Cornelius v. Nutt*, 472 U.S. 648, 650-51 (1985) (citations omitted). Congress explicitly found that:

> [T]he right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them —(A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment.

5 U.S.C. § 7101.

2. *Collective Bargaining Under the CSRA.* Under the Statute, agencies are required to bargain in good faith

with the elected exclusive representative of unit employees concerning conditions of employment. 5 U.S.C. § 7103 (a) (12), 7114(b) (2). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a) (14).

This broad duty to bargain with respect to conditions of employment is subject to two general exceptions. First, the duty does not extend to proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. § 7117(a) (1), (2). Second, the statute contains a management rights provision which reserves certain prerogatives to management, including, most important for purposes of this case, the right "in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a) (2).

The management rights provision does not foreclose all bargaining over how management exercises its rights. All management rights are "[s]ubject to subsection (b)" of Section 7106, which provides that an agency must negotiate concerning "procedures" agency managers will observe in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. § 7106 (b) (2), (3).

The Federal Labor Relations Authority (FLRA) has the responsibility to determine whether particular bargaining proposals fall within or without the statutory duty to bargain. 5 U.S.C. § 7105(a) (2) (E). The CSRA provides a specific administrative procedure for this task, the "negotiability determination", an expedited ap-

peal directly to the FLRA, where the union and employing agency present their arguments for and against the appropriateness of bargaining over a particular issue. 5 U.S.C. § 7117(c). FLRA negotiability determinations are directly appealable to the regional courts of appeals. 5 U.S.C. § 7123.

3. *The Negotiated Grievance Procedure.* In addition to setting forth the duty to bargain in good faith with respect to conditions of employment, Title VII of the CSRA requires all collective bargaining agreements to include procedures for the settlement of "grievances." 5 U.S.C. § 7121(a). "Grievance" is defined by statute to include any complaint by "any employee concerning any matter relating to the employee . . .," complaints regarding the interpretation or breach of a collective bargaining agreement, and complaints concerning any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a) (9).

The negotiated grievance and arbitration procedure is "virtually all inclusive in defining grievance." H.R. Rep. No. 1403, 95th Cong. 2d Sess. 40 (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 689 (Comm. Print 1979) (*Legislative History*). Congress excluded only five subjects from its coverage.[1] The grievance procedure is also the "exclusive procedure for resolving grievances which fall within its coverage," displacing all administrative appeals or internal agency procedures, with exceptions not relevant here. 5 U.S.C. § 7121(a) (1).

---

[1] The five excluded areas are grievances concerning (1) prohibited political activities, (2) retirement, life insurance, or health insurance, (3) suspension or removal for "national security" reasons, (4) examination, certification or appointment, and (5) the classification of a position which does not result in a reduction in pay. 5 U.S.C. § 7121(c) (1)-(5).

All grievances that are not satisfactorily resolved may be submitted to binding arbitration at the election of the agency or the union. 5 U.S.C. § 7121(b)(3)(C).

The statute provides that any subject matter which *could* be grievable under the provisions of the statute *is* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2); H.R. Rep. No. 1717, 95th Cong. 2d Sess. 157 (1978), *Legislative History* at 825; *American Federation of Government Employees, Locals 225, 1504 v. FLRA*, 712 F.2d 640, 642 (D.C. Cir. 1983). Federal sector unions and agencies nonetheless routinely incorporate statutory and regulatory requirements in their collective bargaining agreements and explicitly acknowledge in the agreement that violations of those requirements are subject to the negotiated grievance and arbitration process. This practice is followed both to permit the document to serve as a handy and self-contained reference for supervisors, union representatives, and employees, and to circumvent in advance a later challenge to the arbitrability of a matter. *See Montana Air National Guard v. FLRA*, 730 F.2d 577, 579 (9th Cir. 1984) (agency may demand the inclusion of contract language explaining legally imposed limitations on the grievance procedure).

4. *OMB Circular A-76.* The Office of Management and Budget Circular A-76 and its accompanying Supplement are government-wide directives, with which federal agencies are required to comply, in determining whether work currently performed by federal employees should be contracted-out to commercial suppliers. Office of Management and Budget Circular A-76, 44 Fed. Reg. 20556 (1979), *as amended* 48 Fed. Reg. 37,110 (1983), 50 Fed. Reg. 32,812 (1985) (Circular A-76); Supplement to OMB Circular A-76 (Revised) (August 1983) (Supplement); *see* Department of Treasury petition for writ of certiorari (Pet.) at 7-9. Circular A-76 specifies that services should be acquired from the private sector where it would be

cost-effective to do so. The Supplement provides the procedures which agencies must follow to determine whether contracting-out is cost-effective.

The Supplement also specifies its own appeals procedure in order to provide "administrative safeguards" to ensure that decisions are "fair and equitable" to "directly affected parties"—defined, among others, as "Federal employees and their representative organizations"—and that the decisions are made in accordance with the procedures in the Supplement. Circular A-76, § 6(g); Supplement at I-14. The appeal procedure covers challenges to the accuracy of the cost comparison, or the propriety of any agency decision to contract-out without a cost comparison, but does not cover either disputes between contractors or "government management decisions." Supplement at I-14. The Supplement states that its provisions "d[o] not authorize an appeal outside the agency or judicial review" and that the "procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement." *Id.* at I-15.

B. The Proceedings in this Case

1. During term negotiations with the IRS in 1986, NTEU offered a variety of proposals concerning contracting-out procedures, including the proposal at issue here, that "[t]he Internal Appeals Procedure [used for challenging contracting-out decisions] shall be the parties' grievance and arbitration provisions of the Master Agreement." *See* Appendix to Department of Treasury petition for writ of certiorari (Pet. App.) at 10a. IRS objected that the proposal, which would substitute the negotiated grievance procedure for the Circular's appeal procedure, was not properly within the scope of bargaining. NTEU then filed a negotiability appeal with the FLRA pursuant to 5 U.S.C. § 7117 (Pet. App. at 10a).

2. The FLRA held that NTEU's proposal is negotiable, relying in large part on its previous decisions in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA 3 (1982), *enforced sub nom. EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) (*EEOC*), and *American Federation of Government Employees, Local 1923 and Department of Health and Human Services*, 22 FLRA 1071 (1986), *rev'd sub nom. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc). It concluded that Circular A-76 is a government-wide rule or regulation, and that claimed violations of a rule or regulation are within the statutorily prescribed scope of the grievance procedure (Pet. App. at 13a). It held that agency regulations like Circular A-76 cannot unilaterally limit employees' statutory rights to file grievances over agency decisions which affect conditions of emp'oyment, as Circular A-76 purports to do (Pet. App. at 12a). Finally, the FLRA determined that permitting grievances concerning management's failure to comply with applicable statutes or regulations does not interfere with management's right to contract-out, because it would "only contractually recognize and provide for the enforcement of external limitations on management's right", namely, the external limitations mandated by Circular A-76 (Pet. App. at 15a).

3. The agency filed a petition for review in the D.C. Circuit. The panel (with Judge D.H. Ginsburg dissenting) affirmed the FLRA's rulings. It recognized that NTEU's proposal is similar to the proposal which was at issue in *EEOC*, and could find "no intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. App. at 5a).

In *EEOC*, the D.C. Circuit held negotiable a union proposal that, like the proposal at issue here, would have permitted disputes concerning an agency's compliance

with Circular A-76 to be submitted to grievance and arbitration. The court rejected the agency's argument that the proposal was not negotiable because it violated management rights or because it conflicted with Circular A-76 itself. *EEOC*, 744 F.2d at 847. The court reasoned that under the management rights clause management's contracting-out authority must be exercised "in accordance with applicable laws," such as Circular A-76. 5 U.S.C. § 7106(a)(2); *EEOC*, 744 F.2d at 848. Because the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting-out decisions, within the meaning of the Statute; it merely provided a procedure for enforcing existing substantive limitations. *Id.* at 848-851. Further, the Court noted, given the Statute's expansive definition of "grievance", a complaint asserting that a contracting-out decision was not made in accordance with laws, rules or regulations, including Circular A-76, would be grievable even in the absence of the proposal. *Id.* at 849-851. Finally, the Court rejected EEOC's argument that the language of Circular A-76 itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. It observed that the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions, and that, in any event, agencies could not limit by regulation the statutorily defined grievance procedure. *Id.* at 851.[2]

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[2] In *EEOC*, this Court granted the agency's petition for a writ of certiorari, and then dismissed the writ as improvidently granted, because several of the issues which the agency presented to the Court on certiorari had not been raised before the FLRA or the D.C. Circuit. *EEOC*, 476 U.S. 19, 23; *see* 5 U.S.C. § 7123(c). In particular, the agency sought to argue for the first time in this Court: 1) that Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2); 2) that the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of grievance; and 3) that the Circular none-

In this case, the panel's decision, affirming on the basis of the court of appeals' decision in *EEOC*, was in conflict with the decisions of the Fourth and Ninth Circuits, which had both rejected *EEOC*. *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985); *Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (*HHS*). Judge D.H. Ginsburg dissented from the court's holding that it was bound by the earlier *EEOC* decision and indicated that he would reverse the FLRA's decision, for the reasons explained in the Fourth Circuit's decision in *HHS* (Pet. App. at 8a, 9a).

The agency's petition for rehearing with suggestion for rehearing *en banc*, was denied (Pet. App. at 22a).

DISCUSSION

1. NTEU agrees with the agency's conclusion that it is appropriate for this Court to grant the petition for writ of certiorari and consider the important issues presented by this case. First, there is a clear conflict in the circuit courts over whether disputes concerning an agency's compliance with Circular A-76 may be resolved under the negotiated grievance and arbitration process. Indeed, the question has closely split two of the three circuits which have addressed it. Five of the eleven judges of the Fourth Circuit joined Judge Murnaghan's dissent in the HHS case and both the D.C. Circuit's original decision in *EEOC* and its decision in this case drew dissenting opinions from a member of the panel. *See HHS*, 844 F.2d at 1100, 1108; *EEOC*, 744 F.2d at 852; Pet. App. at 8a.

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theless is a "Government-wide rule or regulation" for purposes of Section 7117(a)(1). *EEOC*, 476 U.S. at 22. The agency raised these arguments in this case, but neither the FLRA nor the court of appeals believed that the arguments undercut either the rationale or the result of their earlier decisions.

2. Review is also warranted because of the substantial importance of the issues presented to both employees and managers, and to the vindication of Congress' intent to encourage the use of the negotiated grievance and arbitration procedure to settle disputes in the workplace. The agency's position here, and the reasoning employed in the rulings of the Fourth and Ninth Circuits would upset the delicate balance Congress sought to strike under the CSRA between the rights of employees and agencies, and would unduly confine the scope of the negotiated grievance and arbitration procedure, which Congress intended to be expansive.

a. First, the agency's position that the Union's proposal runs afoul of the management rights clause distorts the nature of the protection Congress afforded the enumerated management prerogatives found in Section 7106 (a). Congress clearly intended the management rights clause to be a "narrow exception" to the duty to bargain. 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978) (statement of Rep. Clay), *Legislative History* at 932. Further, even in protecting management rights, Congress explicitly made their exercise subject to negotiation over procedures and appropriate arrangements for adversely affected employees. 5 U.S.C. § 7106(b)(2),(3); 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (statement of Rep. Udall), *Legislative History* at 924.

As the D.C. Circuit observed in *EEOC*, it is "untenable" to suggest that the management rights provision gives agency managers unfettered and unreviewable discretion over the subjects it covers. *EEOC*, 744 F.2d at 848. Rather, Congress intended the management rights provision to prohibit negotiation over proposed *substantive* limitations on management's authority beyond those already imposed by external law or rules that agencies are required to follow, like Circular A-76. *Id.*; *HHS*, 844 F.2d at 1101, 1104-1105 (Murnaghan, J. dissenting). The agency's argument here, (Pet. 19-20) that manage-

ment's right is abridged merely by giving arbitrators authority to review whether the agency complied with those external limitations, would neutralize the expansive grievance provisions of the statute and upset settled law.[3] Under the agency's approach, contrary to Congressional intent, an employee would *never* be able to use the negotiated grievance procedure to enforce laws, rules, and regulations that concern a management right.

b. Further, the agency's assumption that arbitral review will result in interference with the discretion the Circular A-76 grants management is unfounded.

First, contrary to the agency's argument (Pet. at 19), many decisions that managers are required to make under Circular A-76 are purely non-discretionary in nature.[4] The Circular itself distinguishes between those matters that are "management decisions" and those that are not, and makes the latter appealable under the internal appeals process. The union's proposal in this case would, by its express terms, merely permit employees to file grievances over matters—presumably those OMB regards as non-discretionary—that they may already challenge through the agency procedure.[5]

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[3] Courts have explicitly affirmed the use of the negotiated grievance procedure to review management's exercise of its right to "discipline," *Cornelius v. Nutt*, 472 U.S. 648 (1985), and to "direct" and "assign," *National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982), and to "lay-off." *Andrade v. Lauer*, 729 F.2d 1475, 1484-89 (D.C. Cir. 1984).

[4] See for example, the non-discretionary requirements governing various management determinations that are described in the Supplement at parts I(2)(C), I(2)(G), IV(2)(A); IV(3)(B), and IV-46 (illustration 5-1).

[5] A key purpose of the exclusivity language of Section 7121 of the CSRA was to not only permit, but to require, the negotiated procedure to substitute for internal agency procedures like those set forth in Circular A-76:

> [A]n employee covered by a collective bargaining agreement must follow the negotiated grievance procedure rather than the agency procedure available to other employees not covered by the agreement.

H.R. Rep. No. 1717 at 157, *Legislative History* at 825.

Further, the agency's argument ignores that under the CSRA scheme arbitrators are frequently called upon to review the exercise of a reserved management right for compliance with law, rule, or regulation (including mandatory policy directives, like, for example, the Federal Personnel Manual). In discharging that function they are never entitled to substitute their judgment on a matter of discretion for the judgment of management. *HHS*, 844 F.2d at 1103 (Murnaghan, J. dissenting) (citing *National Treasury Employees Union v. FLRA*, 767 F.2d 1315, 1317-18 (9th Cir. 1985); *American Federation of Government Employees, Local 1968 v. FLRA*, 691 F.2d 565, 573-74 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983)). The FLRA has not hesitated to discharge its statutory duty to insure that arbitrators do not exceed their authority in the context of any of the enumerated management rights, including the right to make determinations with respect to contracting-out; nor has it hesitated to assure that arbitral review does not, as the agency speculates (Pet. 17), "impede the effective operation of the government." *See Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, Local 2840*, 22 FLRA 656, 661 (1986).

c. The agency's argument that Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2) (Pet. at 24), nor a "law, rule, or regulation" within the meaning of Section 7103(a)(9) (Pet. at 27), reflects a cramped notion of the scope of the grievance procedure, and threatens to vitiate a pivotal element of the statutory scheme. Circular A-76 is a government-wide directive that is binding on all federal agencies. It obviously falls within the plain meaning of the phrase "applicable law" because it is an externally imposed limit on

agency action, and the government does not dispute that it acts as a constraint on agency discretion. Circular A-76 also clearly fits within the expansive phrase "law, rule, or regulation" which is used in defining the term "grievance."[6] Moreover, disputes concerning an agency's compliance with Circular A-76 fall within an entirely independent clause of Section 7103(a)(9) (defining "grievance"), because they certainly "concern any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A).

The agency provides no support, either in the language or legislative history of the Statute, for its argument that there are species of internal guidelines or policies that are binding upon managers and that directly affect working conditions but are beyond the scope of the negotiated grievance procedure. Indeed, the agency's position is actually contrary to the structure of the Statute, which purports to contain (at Section 7121(c)) an exhaustive list of the matters not subject to the grievance procedure, a list that does not include decisions concerning contracting-out, or decisions pursuant to binding internal management policies. Further, the legislative history elsewhere defines a "government-wide rule or regulation" to include "official declarations of policy which are binding on officials and agencies to which they apply." H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158, *Legislative History* at 826. Absent some indication of Congressional intent to use the term "rule or regulation" differently in different parts of the statute, it is reasonable to conclude that the term has the same meaning throughout. *Finnegan v. Leu*, 456 U.S. 431, 438 & n.9 (1982).

d. Finally, the agency's argument that the Circular itself can limit the scope of the statutorily prescribed

[6] *Cf.* 5 U.S.C. § 551(4) (defining "rule" under the Administrative Procedure Act to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

grievance procedure is untenable.[7] As the D.C. Circuit has explained, a union proposal allowing grievances concerning violations of A-76 is not inconsistent with the Circular because it does not "create" any new right of appeal; the right to enforce government-wide rules through the negotiated grievance procedure was created by the CSRA. *EEOC*, 744 F.2d at 851; *HHS*, 844 F.2d at 1108 (Murnaghan, J., dissenting). Further, and "more important," Congress did not intend "to allow agencies to limit by regulation the statutorily defined scope of the grievance procedure." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] The agency's argument that the Circular may foreclose grievances because it is a "rule or regulation "for purposes of Section 7117 is, of course, squarely at odds with its insistence that the Circular is *not* a rule or regulation for purposes of Section 7103.